

On April 15, 2011, the Court heard argument on defendant's motion to dismiss the indictment. Joseph Audal appeared on behalf of the government; Jerome Matthews appeared for defendant. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby grants defendant's motion to dismiss the indictment.

I. BACKGROUND

Defendant is a 41-year-old citizen of Mexico. Del Gadillo entered the United States, without permission, in 1988. He met Veronica Garza ("Garza") in April, 1991. Declaration of Veronica Garza "Garza Decl.," ¶ 2. Garza was and has always been a citizen of the United States. Del Gadillo and Garza grew very fond of each other and began a relationship.

On December, 1992, Garza gave birth to their first child, Ricardo Vazquez. On April 27, 1994, Garza gave birth to their second child, Jessica Vazquez. At the time, Del Gadillo was working full-time and was the family's sole provider. The family continued to live at Del Gadillo's home in Union City. On February 9, 1995, Del Gadillo and Garza were married in a civil ceremony in Fremont, California. Garza Decl., ¶ 3. On

1 March 18, 1996, Garza gave birth to their third child, Louis
2 Felipe Vazquez. Del Gadillo continued to work full time and
3 remained the sole financial provider for his young family.

4 In August 26, 1996, Defendant was convicted of assault
5 with a firearm, in violation of California Penal Code
6 § 245(a)(2), and was sentenced to three years probation with
7 the condition that he serve 195 days in jail. See Declaration
8 of Jerome E. Matthews ("Matthews Decl."), Exhibit ("Ex.") A.
9 Shortly thereafter, Immigration and Naturalization Service
10 ("INS") began the process to remove Defendant from the United
11 States on the grounds that he was in the country without being
12 inspected and that he was convicted of using a firearm in
13 violation of California law. See Matthews Decl., Ex. B.

14 On October 4, 1996, defendant appeared before an
15 Immigration Judge ("IJ") in what is referred to as a "removal
16 hearing." At the conclusion of that process the IJ ordered
17 Defendant removed to his native country, Mexico. See Matthews
18 Decl., Ex. E. Although the forms regarding defendant available
19 to the IJ at the hearing indicated that defendant had a United
20 States Citizen spouse and United States Citizen children, the
21 IJ did not discuss with defendant the impact that fact might
22 have had upon his immigration situation. On October 5, 1996,
23 Defendant was removed. Government's (Govt.'s) Exh. A.

24 On or about May 2010, Defendant re-entered the United
25 States without permission and was residing in the Northern
26 District of California. On October 29, 2010, a federal grand
27 jury for the Northern District of California returned a
28 one-count Indictment against Defendant, charging him with being

1 a previously deported alien who was found in the United States
2 without the consent of the Attorney General or the Secretary of
3 Homeland Security, in violation of 8 U.S.C. § 1326.

4 **II. LEGAL STANDARD**

5 Under 8 U.S.C. § 1326(d), in order to sustain a
6 challenge to a prior deportation order, the defendant must
7 demonstrate (1) exhaustion of administrative remedies; (2) that
8 the challenged deportation proceedings improperly deprived the
9 defendant of the opportunity for judicial review; and that (3)
10 the entry of the deportation was fundamentally unfair. The
11 government concedes that under the circumstances defendant is
12 deemed to have exhausted his administrative remedies. They
13 also concede that the deportation proceedings deprived
14 defendant of the opportunity for judicial review.

15 The issue therefore is whether defendant can show that
16 the entry of deportation was fundamentally unfair. A
17 deportation order is "fundamentally unfair" if the defendant's
18 due process rights were violated in the deportation proceeding
19 and he was prejudiced by the defects. See United States v.
20 Ramos, 623 F.3d 672, 680 (9th Cir. 2010) (citing United States
21 v. Pallares-Galan, 359 F.3d 1088, 1095 (9th Cir. 2004)).

22 To prove prejudice, the alien must prove that there was
23 a plausible ground for relief available but for the deprivation
24 of his rights. See United States v. Leon-Leon, 35 F.3d 1428,
25 1432 (9th Cir. 1994).

26 **III. DISCUSSION**

27 Because of his United States Citizen wife, defendant
28 might have been able to seek relief from deportation.

1 Normally, the fact that defendant had been convicted of a crime
2 of moral turpitude would render him ineligible for this relief.
3 However, a person who is ineligible because of a crime of moral
4 turpitude may still get a waiver of ineligibility if he can
5 demonstrate extreme hardship to a United States Citizen spouse
6 or children. INA § 212(a)(2)(A)(I).

7 The burden is on the defendant to make a *prima facie*
8 showing of prejudice. See United States v. Gonzalez-Valerio,
9 342 F.3d 1051, 1054 (9th Cir. 2003). At this stage of the
10 proceedings, to collaterally attack the deportation, defendant
11 need not show that he actually would have been granted the
12 relief, he need only show a " 'plausible' ground for relief
13 from deportation." United States v. Arrieta, 224 F.3d 1076,
14 1079 (9th Cir. 2000).

15 Under Section 212(h), the "Attorney General may waive
16 removal if deportation would cause extreme hardship to
17 relatives of the alien who are U.S. citizens or permanent legal
18 residents." United States v. Becerril-Lopez, 541 F.3d 881, 886
19 (9th Cir. 2008) (citing 8 U.S.C. § 1182(h)(1)(B)) (emphasis
20 added). "Extreme hardship requires great actual or prospective
21 injury or extreme impact on the citizen family member, beyond
22 the common results of deportation." United States v.
23 Moriel-Luna, 585 F.3d 1191, 1199 n.5 (emphasis added).

24 The Ninth Circuit has held that it "will find prejudice
25 only after a clear, detailed demonstration that the defendant
26 provided 'noneconomic familial support' or 'something more'
27 than financial support." Becerril-Lopez, 541 F.3d at 886
28 (emphasis added).

1 Defendant's motion speaks about his eight children and
2 emotional and financial difficulties to them. Defendant has
3 included for example a letter from his daughter Jessica's
4 current high school counselor attesting to emotional issues
5 for the daughter based on Del Gadillo's current incarceration.
6 He also speaks to the emotional effects currently on one of
7 his youngest children.

8 The government argues first that the only relevant facts
9 are those which were in existence at the time of defendant's
10 deportation in 1996. For support for this proposition the
11 government cites United States v. Muro-Inclan, 249 F.3d 1180,
12 1185 (9th Cir. 2001)(to demonstrate prejudice, defendant "must
13 show that there was a 'plausible ground for relief from
14 deportation' if he had sought such relief *at the time* of his
15 underlying deportation hearing." (emphasis added)). The
16 government also relies Muro-Inclan, to assert that defendant
17 has not made a sufficient showing of extreme hardship to
18 demonstrate as a matter of law that he had a plausible grounds
19 for relief.

20 Defendant in turn relies on United States v. Arrieta,
21 *supra.*, to support his argument that he has demonstrated
22 sufficient hardship to his United States Citizen spouse and
23 children beyond mere economic hardship that he has raised a
24 plausible grounds for relief.

25 The facts of this case are closer to Arrieta than to
26 Muro Inclan. In Muro-Inclan the wife submitted a declaration
27 to the effect that she needed her husband's assistance to
28 raise their children. The Ninth Circuit found this

1 declaration insufficient, but the Ninth Circuit was no doubt
2 influenced by the fact that defendant had been incarcerated
3 for 10 of the preceding 13 years and so already had not been
4 able to substantially assist his family. The facts of this
5 case are more like those in Arrieta. In Arrieta, the
6 defendant's mother submitted a declaration outlining the
7 "critical role" that Arrieta played assisting her in raising
8 his younger siblings, with both financial and practical
9 support. While the materials submitted here by Del Gadillo
10 are not quite as detailed about the non-economic support Del
11 Gadillo lavished on his family prior to his deportation, he
12 was the sole financial provider for his family, he lived at
13 home with his wife and three infant children and there is
14 nothing in the record to indicate that he was anything other
15 than an involved father at that point. Moreover since he
16 returned to the United States, the record is clear that he
17 took an active role in parenting his children, so the Court
18 may infer that this was the role Del Gadillo played in the
19 family prior to his deportation.

20 Focusing solely on time period of his deportation,
21 Jessica was two and a half years old. Veronica Garza's
22 declaration states that when Del Gadillo was deported Jessica
23 cried all the time and had difficulty sleeping. The family
24 also suffered financial hardships. Garza did not have a job.
25 Following Del Gadillo's deportation, Garza lived off of
26 Welfare. She received \$541 a month, \$300 of which she had to
27 pay to her mother for rent.

28 While the financial hardship in and of itself would not

1 have been sufficient, the Court finds that when combined with
2 the significant parental role of the defendant and the
3 emotional toll of breaking up the family unit, the
4 circumstances are sufficient to constitute a plausible showing
5 of extreme hardship as set out in Arrieta. ("'preservation of
6 family unity' may be a central factor in an extreme hardship
7 determination.") Arrieta, 224 F.3d at 1082, citing Cerillo-
8 Perez v. INS, 809 F.2d 1419, 1423 (9th Cir. 1987). Defendant
9 has met his burden of showing that his due process rights were
10 violated in his prior deportation proceeding. As such the
11 government cannot prove one of the elements of a violation of
12 18 U.S.C. § 1326 alleged in the Indictment and the Indictment
13 must be dismissed.

14

15 **IV. CONCLUSION**

16 For the foregoing reasons, defendant's Motion to Dismiss
17 the Indictment is GRANTED.

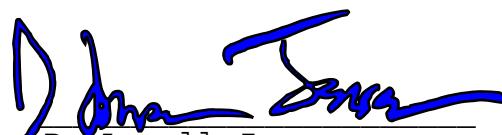
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20 IT IS SO ORDERED.

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Dated: April 21, 2011



D. Lowell Jensen
United States District Judge

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